he has reposed on that lawyer to conduct the prosecution of his case responsibly and with the expected competency; thus the litigant should be left by himself to seek remedy against his own lawyer should the latter be found wanting on this score. Such a litigant should not be coddled by the Court in the name of justice.

For the above further reasons the plaintiff's application herein would in any event, on its merits, also have been dismissed with costs to the defendant.

The approach taken by me and Mohd Nor bin Haji Abdullah JC (as he then was) in this case may appear to be somewhat drastic, but it is nevertheless wholly consistent with the dictates of the current conditions of our Courts in terms of backlog of cases; and, in this case, no doubt amply contributed to by the nonchalant conduct of Counsel to the Court. In this application for reinstatement, even if the plaintiff had succeeded on the preliminary issue, I would nevertheless have decided not to exercise my discretion for the compelling reasons aforesaid, yet I am mindful that essentially the exercise of such discretion has to be decided upon the individual merits of each application.

PUBLIC PROSECUTOR

v.

HON JIEW FOH @ AH HO

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[CRIMINAL REVISION NO. KG. 2 OF 1994 (II)]
25 JUNE 1994

CRIMINAL PROCEDURE: Criminal revision - Order of discharge not amounting to an acquittal - Power of Magistrate to make order - Propriety of grounds for order - Accused discharged when prosecution ready to proceed with trial - Whether order thereof valid - CPC ss. 173, 325

CRIMINAL PROCEDURE: Control and conduct of prosecution - Whether lies entirely with the Public Prosecutor - Whether Magistrate had power to direct Prosecuting Officer to refer investigation papers to Public Prosecutor - CPC s. 376, Federal Constitution Art. 145(3).

This criminal revision was in respect of an order of the Magistrate discharging the accused herein not amounting to an acquittal. The facts showed that the Magistrate, in making the said discharge order, had not grounded the order upon any of the grounds laid down in s. 173 CPC but solely for the reason that the Prosecuting Officer had failed to refer the investigation papers in respect of the charge to the Public Prosecutor, as ordered by the Magistrate. The Magistrate seemed to have taken the disobedience of the Prosecuting Officer as an act of contempt but preferred to discharge the accused in substitution of a contempt proceeding "in the exercise of his discretion". The prosecution at the material time was ready to proceed with the trial.

The issues that arose were:

(1) Whether the Magistrate, in the circumstances, could order the officer conducting the prosecution to have the investigation papers referred to the Public Prosecutor and if so, whether disobedience of such order amounted to contempt.

(2) Assuming that the Magistrate's order for reference of the papers aforesaid to the Public Prosecutor was valid, whether the Magistrate could then discharge the accused not amounting to an acquittal as an alternative to a proceeding for contempt.

Held:

[1] The "order" of the Magistrate directing the Prosecuting Officer to refer the investigating papers to the Public Prosecutor could only be taken as an advice on the conduct of the prosecution and disobedience thereto cannot constitute contempt.

[2] The power and authority of a Magistrate in such a case as this is to hear,try, determine and dispose off the case in a summary way and that of the Public Prosecutor is to have control and direction of the prosecution. Reading together Article 145(3) of the Federal Constitution and the provisions of ss. 173, 376 of the CPC, it is clear that until the prosecution decides to continue or until the Court considers that the charge is groundless, the Court has no power to put an end to the proceedings *albeit* a discharge not amounting to an acquittal as happened in this case.

[3] Bearing in mind that the prosecution herein was ready to adduce evidence upon the charge, the Magistrate had clearly erred in making the order of discharge in question. When the Prosecuting Officer informed the Court that the instruction received was to proceed with the case, the Magistrate should have fixed a date for hearing and then proceeded with the trial instead of making another "order" for the case to be referred to the Public Prosecutor.

[Magistrate's order set aside. Retrial before another Magistrate ordered].

Cases referred to:
Kuppusamy v. PP [1948] 14 MLJ 25
PP v. Zainuddin & Anor. [1986] 2 MLJ 100 SC

Legislation referred to:
Criminal Procedure Code, ss. 9(a), 173, 325, 376, 377
Penal Code, s. 411

For the applicant - Thomas Akin, SFC
For the respondent - Charles Kanavathi; M/s. C. M. Kanavathi & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:

This is a criminal revision pursuant to s. 325 of the Criminal Procedure Code (hereinafter referred to as "the CPC") in respect of Magistrate's Court case No. M/CR/41/91/B upon the application of the Public Prosecutor. In exercise of my revisionary power, on 22 June 1994 in my oral decision I set aside the order of the learned Magistrate discharging the accused not amounting to an acquittal, and ordered that there be a retrial upon the charge before another Magistrate. I now state my grounds of decision.

The chronology of events leading to the said order of the learned Magistrate are as follows. On 2 February 1991 the accused was charged in Court for an offence under s. 411 of the Penal Code. He claimed to be tried and the hearing was scheduled for 28 October 1991. However, from then on the hearing never took place owing to four adjournments, 3 at the instance of the prosecution and one at the Court's instance, and the hearing was put forward to 28 October 1993.

On 28 October 1993 a fresh plea was taken and the accused maintained his earlier plea. When the case was supposed to proceed to trial, the Prosecuting Officer asked for an adjournment to enable the matter to be referred to the Deputy Public Prosecutor for instruction as to whether to proceed or withdraw the charge against the accused. There was no objection from the learned Counsel for the accused but asked for a new mention date. For the reason, the Court adjourned the case for mention to 25 November 1993. On 25 November 1993 the Prosecuting Officer informed the Court that the instruction was to proceed with the case and further informed the Court that this instruction came from his superior officer and not from the Deputy Public Prosecutor. According to the notes of the proceedings, the following events then took place:

Court:	The Court ordered, the I.P. to be referred to the DPP. This was not done.
Counsel:	Nothing to say.
Court:	Once again, I order that the I. P. be referred to DPP direct by the PO for order. This Court had once ordered that to be done and obviously had good reasons for the same.
	The order of Court must be obeyed. The I.P. must be released to the DPP.
	Adjourned for further mention on 17 December 1993 @ 9 a.m.
	Bail extended.

According to the notes of the proceedings, the following events happened on 17 December 1993:

Insp.:	Apologize to Court. I have sent file to immediate boss for file to be sent

to DPP. I was however instructed to proceed by the OCP upon direction by OCCI. The file was never sent. The first time was upon request by OCP, probably now they think it is not necessary.

Counsel: At the first instance, the PO asks for adjournment on basis that PO wanted to send I.P. to DPP on that basis Court gave adjournment and ordered I.P. be referred to DPP. At first hearing, file not referred to DPP. Court then ordered that time order to sent I.P. to DPP must be obeyed yet file not referred to DPP. This should not be grounds for adjournment. Unnecessary hardship to client, saying need to release and then not to refer. Ask therefore discharge not amounting to acquittal.

Insp: I was instructed to proceed, on record I am ready to proceed part-heard.

Court: The matter at issue is quite simple. The Court acting on the prompting of the PO who was under instructions of the officer-in-charge of Court on 25 October, 1993 ordered the I.P. to be referred to the DPP. This was not done and on 25 November 1993 when matter came up for re-mention the PO told the Court that the IP was not referred because of instructions of his senior officers.

The Court on that occasion ordered the I.P. to be referred by the PO direct to the DPP and warned that the order of Court must be obeyed. Essentially this order was disobeyed. It is not for the OCP or OCCI to not obey the Court, whether they agree with its decision or not. They must obey - disobedience of Courts order, even an illegal one constitutes contempt. The express order of the Court disobeyed, I could proceed to order whoever stopped that order being complied with to show cause why they are not in contempt.

Instead, I shall exercise discretion to discharge the accused not amounting to an acquittal and I so order.

Following the detailed events mentioned above, what calls for determinations are:

1. Can the Court order the officer conducting the prosecution to have the investigation papers referred to Deputy Public Prosecutor, the consequence of the failure to do so would amount to disobeying a Court order?
2. If the Court order is validly made, can the Court order the discharge of the accused not amounting to an acquittal upon the charge as an alternative to proceeding for contempt?

An offence under s. 411 of the penal code, a seizable offence, is one where a Magistrate will take cognisance under s. 128 of the CPC and is triable summarily before him. His power and authority in such a case as is provided in s. 9(a) of the CPC is to hear, try, determine and dispose off in a summary way prosecutions for such an offence committed wholly or in part within his local jurisdiction. On the other hand, by s. 376 of the CPC, the Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the CPC whose power is generally delegated to the respective Deputy Public Prosecutors. Under s. 377 of the CPC, a criminal prosecution for a seizable offence before a Magistrate shall be conducted by a police officer not below the rank of Inspector acting on behalf of the Public Prosecutor. Thus the power and authority of the Magistrate in such a case is to hear, try, determine and dispose off the case in a summary way and that of the Public Prosecutor is to have control and direction of the prosecution and proceedings which prosecution before the Magistrate's Court is to be conducted by a police officer not below the rank of Inspector acting on behalf of the Public Prosecutor. Each body has no control or supervisory power over the other in connection with the respective matter. However, in some instances for the smooth functioning of the criminal proceedings before the Court, the Magistrate may advise the Prosecuting Officer to have certain aspect of the matter referred to the Public Prosecutor for his further directions to the prosecution as to the further conduct of the prosecution and the Prosecuting Officer in the interest of justice may take heed of the advice so given. But the ultimate decision remains with the prosecution who will be answerable to the Public Prosecutor, being his agent in the conduct of the prosecution. So this advice of the

Magistrate cannot be construed to be an order from him and the non-compliance with specific order may constitute contempt. If the Magistrate is not happy with the Prosecuting Officer in the circumstances, he may report the matter to the Public Prosecutor for necessary action by the latter. In that light, I am of the view that the learned Magistrate has no power or authority to make an order directing the Prosecuting Officer to refer the investigation papers to the Deputy Public Prosecutor.

Acting on the wrong premise, the learned Magistrate discharged the accused from the charge not amounting to an acquittal on the failure to comply with his "order" to have the investigation papers referred to the Deputy Public Prosecutor. In summary trial, the procedure to be followed by Magistrate is governed by s 173 of the CPC. Subsections (g) and (n) provide for the discharge of the accused. According to *Kuppusamy v. PP* [1948] 14 MLJ 25, the discharge under subsections (g) and (n) means a discharge not amounting to an acquittal. This is on the stated ground that the Court considers the charge to be groundless, or in a private summons case, on the day fixed for the hearing of the case the complainant is absent and the offence may lawfully be compounded. Under those circumstances the Court has not heard the evidence for the prosecution. According to the dicta in *PP v. Zainuddin & Anor*. [1986] 2 MLJ 100 SC, an accused may be discharged not amounting to an acquittal when the application for an adjournment made by the prosecution was turned down by the Court and the prosecution is unable to proceed with the trial.

In our present case, the learned Magistrate discharged the accused not amounting to acquittal, not on the ground that the charge is groundless but on the ground that the Prosecuting Officer or those in the police department refusing to comply with his order that the investigation papers be referred to the Deputy Public Prosecutor whereas on the other hand the prosecution were ready to proceed with the trial. Article 145(3) of the Federal Constitution declares that "the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ....". So until the prosecution decides to discontinue or until the Court considers that the charge is groundless, the Court has no power to put an end to the proceedings albeit a discharge not amounting to an acquittal as happened in this case. On 25 November 1993 when the Prosecuting Officer informed the Court that the instruction received was to proceed with the case, the learned Magistrate should have fixed a date for hearing and then proceed with the trial instead of making another "order" for the investigation papers to be so referred to the Deputy Public Prosecutor.

It may well be said that the discharge in this case is one not amounting to an acquittal, so why worry? The accused could be re-arrested and re-charged. However, the Court is exercising a judicial function. Justice must be seen to be done on all sides, to the prosecution as well as to the defence. It is no consolation to the accused obtaining a discharge not amounting to an acquittal upon an expression of anger and exasperation at or as a censure against the conduct of the prosecution: *PP v. Zainuddin & Anor supra*. At page 103 Salleh Abas LP says:

> There is no advantage to him if his discharge will result in his subsequent re-arrest, because by then his solicitor or Counsel would have been discharged following his discharge by the Court and therefore his solicitor or Counsel has to be re-engaged, thus entailing additional expenses. The Court's record no doubt would appear to be neat and tidy by the order of discharge but it does not solve the problem of the accused's liability and possibility of disadvantage and inconvenience that would be caused to him.

For the reasons stated above, I am of the view that the learned Magistrate has erred in making the order of discharge of the accused not amounting to an acquittal, in the circumstances, when the prosecution is ready to proceed to adduce evidence upon the charge.